UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 0	05-1416 & 06-1098
	IGHTS, LOCAL UNION 2471, affiliated with CARPENTERS AND JOINERS OF AMERICA
	Petitioner v.
NATIONAL LA	BOR RELATIONS BOARD
	Respondent
	L, INC., WILLIAM A. GREENE, NTHIA D. GREENE
	Intervenors
NATIONAL LA	BOR RELATIONS BOARD
	Petitioner v.
A.J. MI	ECHANICAL, INC.
	Respondent
	ID APPLICATION FOR ENFORCEMENT OF IONAL LABOR RELATIONS BOARD
	BRIEF FOR LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

These consolidated cases are before the Court on a petition to review, and an application to enforce, a backpay order of the National Labor Relations Board ("the Board") which issued against A.J. Mechanical, Inc. ("the Company"), but dismissed against the Company's co-owner, William A. Greene ("Greene"), and his wife, Cynthia D. Greene (collectively referred to as "the Greenes"). The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Board's Supplemental Decision and Order was issued on August 26, 2005, and is reported at 345 NLRB No. 22, 2005 WL 2094926. (A 8-19.)¹ The Order is final with respect to all parties.

The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). On November 4, 2005, the charging party below, Carpenters and Millwrights, Local Union 2471, affiliated with the United Brotherhood of Carpenters and Joiners of America ("the Union"), filed a petition for review challenging the Board's finding that the Greenes were not personally liable for the Company's backpay obligations under the Board's

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¹ "A" references are to the joint appendix. References preceding a semicolon are to the Board's findings; references following a semicolon are to the record evidence supporting the those findings.

Order. In support of the Board, the Company and the Greenes have intervened in the Union's review proceeding.

On March 20, 2006, the Board filed an application for enforcement of its Order against the Company, which the Court consolidated with the review proceeding. The Union has intervened in the enforcement proceeding in support of the Board. The Union's petition for review, and the Board's application for enforcement, were timely because the Act imposes no time limit on the initiation of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUES

- 1. Whether the Board is entitled to summary enforcement of its uncontested Order requiring the Company to pay specific amounts of backpay.
- 2. Whether the Board reasonably determined that the Greenes are not personally liable for the Company's backpay obligations.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

In an earlier summary judgment proceeding, the Board found that the Company engaged in numerous unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act (29 U.S.C. § 158(a)(1), (3), and (5)). Subsequently, the United States Court of Appeals for the Eleventh Circuit enforced the Board's

order in full. See 330 NLRB No. 178, 2000 WL 420615 (Apr. 14, 2000)
(unpublished), enforced in an unpublished judgment, 11th Cir. Case No. 00-14628
(Oct. 23, 2000). (See also A 370.)

After enforcement, disputes arose during the compliance stage of the case over the amount of backpay the Company owed, and whether the Greenes were personally liable for the Company's backpay obligations. After a compliance hearing was held, the administrative law judge issued his Supplemental Decision and recommended Order finding the Company liable for the amounts of backpay alleged by the General Counsel in the compliance specification because the Company had failed to answer the specification or appear at the hearing. Based on the testimony and evidence presented at hearing, the judge also found the Greenes liable for the Company's backpay obligations. The Greenes filed exceptions to the judge's decision, but the Company did not.

On review, the Board adopted (A 8, 11), in the absence of exceptions, the administrative law judge's recommended findings and Order with respect to the Company. The Board majority, however, rejected the judge's recommended Order insofar as it imposed liability on the Greenes, and dismissed the compliance specification allegations against them. (A 8-11.) The procedural history of the case, followed by the Board's findings of fact, are set forth below; other relevant facts are discussed in the Argument.

I. THE PROCEEDINGS BELOW

A. Background; the Underlying Unfair Labor Practice Proceeding

In 1993, the Company, which had offices in Florida, began operating as a mechanical contracting business specializing in refurbishing and upgrading gas turbines. William A. Greene and James Sanders were co-owners of the Company, and its sole directors and stockholders. In late 1998, the Union began a campaign to organize the Company's mechanics, helpers, and laborers. In April 1999, the Union filed a petition for an election. In May, the Board conducted a pre-election hearing to determine the appropriate unit. On July 9, the Board conducted an election, which the Union won. That same day, the Board certified the Union as the employees' exclusive collective-bargaining representative. (A 9, 14; 715.) *See* 330 NLRB No. 178, 2000 WL 420615, at *1, 3.

Beginning on May 24, and continuing through November 12, the Union filed a series of unfair labor practice charges alleging that the Company had engaged in numerous violations of Section 8(a)(1), (3), and (5) of the Act. Based on those charges, the General Counsel issued a consolidated complaint on December 28, which the Company failed to answer. On March 13, 2000, the Board's General Counsel moved for summary judgment. On March 16, the Board issued an order transferring the proceeding to the Board, and a notice to show cause why the

motion should not be granted. The Company filed no response. (A 9, 14.) *See* 330 NLRB No. 178, 2000 WL 420615, at *1.

On April 14, 2000, the Board issued a decision granting the motion for summary judgment, and finding that the Company had engaged in the undisputed unfair labor practices alleged in the consolidated complaint. See 330 NLRB No. 178, 2000 WL 420615. Specifically, the Board found that the Company violated Section 8(a)(1) of the Act by committing numerous threats and other acts of coercion against its employees. See id. at *2-4, 6. The Board also found that, in violation of Section 8(a)(3) of the Act, the Company discriminated against employees who supported the Union by taking actions that included discharging them, refusing to hire them or consider them for hire, laying them off and refusing to recall them, and assigning them more onerous working conditions. See id. at *4-6. Further, the Board found that the Company violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union as the employees' certified collective-bargaining representative, and by ceasing business operations without giving the Union prior notice and the opportunity to bargain over the effects of the business closure on the employees. See id. at *5-6.

The Board's unfair labor practice order required the Company, among other actions, to make 118 employees whole for any loss of earnings and other benefits they suffered as a result of the Company's unlawful discrimination against them.

See id. at *8-11. The Board's order also required the Company to bargain with the Union, upon request, over the effects of the business closure, and to reduce to writing any agreement reached between the parties. See id. Subsequently, the Eleventh Circuit enforced the Board's order in full. (A 8; 370.)

B. The Compliance Proceeding

After enforcement, a controversy arose over the amount of backpay owed to the employees who had suffered financial consequences as a result of the Company's unfair labor practices, and whether the Company's shareholders were personally liable for the backpay obligations of the defunct corporation. As part of the compliance investigation, the Board's General Counsel took a series of depositions on March 12, and September 6 and 20, 2001. In February 2002, Sanders and his wife paid \$112,500 in settlement of all claims relating to their backpay liability under the Board's unfair labor practice Order. (A 8 & n.3; 452, 579. 671, 690.)

On October 1, the Regional Director issued a compliance specification and notice of hearing to determine the amount of backpay owed, and to decide the Greenes' personal liability. On October 21, the Greenes filed an answer to the compliance specification. The Company, however, did not file an answer. On October 30, the General Counsel made a motion for a finding that the Company had admitted the allegations of the compliance specification by failing to answer

pursuant to Section 102.56(c) of the Board's Rules and Regulations (29 C.F.R. § 102.56(c), text in statutory addendum). (A 8, 13-14; 234, 385, 398, 452, 579, 671, 690.)

On October 30, 2002, the administrative law judge opened the compliance hearing. After the Company failed to appear, the judge granted the General Counsel's motion, and found that the Company had admitted the allegations of the compliance specification. At that same time, the Greenes informed the judge that they would not be presenting a defense against those allegations. Accordingly, the hearing proceeded on the sole issue of the Greenes' liability for the Company's backpay obligations. (A 8, 13, 14, 16; 257, 269-71.) On January 23, 2003, the judge issued his Supplemental Decision and recommended Order finding the Greenes liable for the Company's backpay obligations. (A 8, 10, 13-19.)

II. THE BOARD'S SUPPLEMENTAL DECISION AND ORDER

On August 26, 2005, the Board (Chairman Battista and Members Schaumber and Liebman) issued its Supplemental Decision and Order adopting the administrative law judge's recommended order requiring the Company to pay the amounts of backpay that were alleged in the compliance specification. (A 8, 11.) On March 17, 2006, the Board issued a Revised Supplemental Order clarifying its intent to adopt that portion of the judge's recommended Order. (A 741.) The Board's Order requires the Company to make whole the 118 employees who

suffered financial losses as a result of the Company's unfair labor practices by paying them specified amounts of backpay. The total amount of backpay due is \$462,755.40, plus interest. (A 741.)

However, in disagreement with the administrative law judge, the Board majority (Member Liebman dissenting) found that the Greenes were not personally liable for the Company's backpay obligations, and therefore dismissed the compliance specification allegations against them. (A 8-12.) Rejecting the judge's recommended finding, the Board majority found that the judge had misapplied, to the facts of this case, the Board's two-part test for "piercing the corporate veil" articulated in *White Oak Coal Co., Inc.*, 318 NLRB 732 (1995), *enforced mem.*, 81 F.3d 150 (4th Cir. 1996). (A 8-11.)

STATEMENT OF FACTS

The Board adopted the findings of fact made by the administrative law judge in his Supplemental Decision. (A 8-9, 13-16.) Those findings, which are based on the testimony and evidence presented at the compliance hearing, concern the Greenes' liability for the Company's backpay obligations. The facts underlying the Board's decision, which are summarized below, are largely undisputed.

A. Background; Greene and Sanders Begin Winding Down the Business and Liquidating Assets in Anticipation of Closing

In 1993, William Greene and James Sanders incorporated the Company in Florida, and each contributed about \$20,000 in initial capital. As co-owners,

Greene and Sanders were the Company's sole directors and stockholders, and made all business decisions jointly. They did not maintain records of their business meetings, and sometimes made undocumented loans to the Company to cover payroll or other expenses. The Company owned two pickup trucks, one titled to Sanders, and the other leased to Greene. A year or two after incorporating, Greene and Sanders each began drawing a monthly salary of \$4,000, and would split any company monies in excess of what they considered necessary for operating the business. (A 9, 14-15 & n.22; 337, 344-52, 463-65, 484-90, 497-502, 587, 594-95, 602-04, 609-11, 616-18, 715.)

In late 1998, the Company was working under contract on a job at the Pensacola docks that was scheduled to be completed on June 25. (A 9, 15; 311-15, 341-42, 357-58, 582-92, 594-95, 601-02, 721.) In early 1999, the Company did not pursue new work. Instead, Greene and Sanders decided to complete only the Pensacola project that was currently underway. To complete that project, the Company worked under a series of short-term contracts with a number of related contractors. (A 9, 10; 291, 311-15, 615-16, 618-19.)

On February 16, 1999, the Company began to liquidate its assets through a series of shareholder distributions made to Greene and Sanders in equal amounts.

In February, March, and April, the Company made the following shareholder distributions:²

February 16	\$ 225,000.00
February 24	50,000.00
March 5	100,000.00
March 26	100,000.00
April 13	100,000.00
April 21	250,000.00
April 22	300,000.00

(A 9, 15, 17-18; 304-05, 427-31, 438-444.)

On May 24, the Union filed its first unfair labor practice charge against the Company. (A 9.) *See* 330 NLRB No. 178, 2000 WL 420615, at *1. On June 10, the Company issued another shareholder distribution to Greene and Sanders in the amount of \$500,000.00. In late June, the Company entered into an additional 2-month contract to allow time to complete some tasks remaining on the Pensacola job. (A 9, 15; 341-43, 357-58, 432-33, 445, 469-72, 721.)

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² Sanders received the April 13 distribution on April 16, and the April 22 distribution on April 24. (A 15 nn. 25-26; 438-39.)

B. The Company Completes the Pensacola Project, and Ends All Work; the Unfair Labor Practice Complaint Issues; Greene and Sanders Complete the Tasks Necessary for the Dissolution of the Company, and Retire

On July 6, Greene consulted with legal counsel concerning the formal dissolution of the Company. (A 15; 305-07, 321, 340-41, 720.) In late July, the Company completed all work on the Pensacola job. (A 9; 305-06, 341-42, 357-58.) On July 29, the Board's General Counsel issued the first of two complaints against the Company. (A 9, 330 NLRB No. 178, 2000 WL 420615, at *1.) On August 5, Greene changed the status of the Company's state contractor's license from active to inactive, and later that month arranged for an auction company to sell the Company's equipment. (A 307-08, 343, 714.)

On September 11, a public auction was held to liquidate the Company's property and equipment. By that time, the Company had ceased all business operations. (A 9, 14; 338, 451, 567, 575-78.) On November 4 and 5, the Company issued a shareholder distribution to Greene and Sanders in the amount of \$217,500.00. (A 9; 434-35, 447.)

On December 2, Greene and Sanders executed a formal resolution to liquidate the corporation, and closed the company bank account. From those funds, the Company distributed a shareholder payment of \$16,345.73 to Greene and Sanders, which they received on December 2 and 6, respectively. (A 9, 15; 307-08, 436-37, 449-50, 667-69, 722-26.) With that payment, Greene and Sanders

each had received \$1,858,845.73 in shareholder distributions since they were begun in February. (A 9, 15; 427-50.) On June 16, 2000, the Company filed with Florida's Department of State papers formally dissolving the corporation. Since dissolution, Greene and Sanders have permanently retired. (A 9 n.7; 304, 308-10, 322, 343-44, 424-26, 596-97, 722-26.)

STANDARD OF REVIEW

Section 10(c) of the Act (29 U.S.C. § 160(c)) authorizes the Board to fashion appropriate orders to prevent and remedy the effects of unfair labor practices. See Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898-99 (1984). The Board's remedial power under Section 10(c) is "a broad, discretionary one, subject to limited judicial review." Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964). Accord Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26, 34 (D.C. Cir. 2001). As the Supreme Court has explained, "[i]n fashioning its remedies . . . , the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." NLRB v. Gissel Packing Co., Inc., 395 U.S. 575, 612 n.32 (1969). Accord Traction Wholesale Ctr. Co., Inc. v. NLRB, 216 F.3d 92, 104 (D.C. Cir. 2000). The authority to fashion remedies under the Act "is for the Board to wield, not for the courts." NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969) (quoting NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953)).

Therefore, "[w]hen the Board, 'in the exercise of its informed discretion,' makes an order of restoration by way of back pay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Seven-Up Bottling Co.*, 344 U.S. at 346-47 (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). *Accord NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295, 1300 (D.C. Cir. 1988). This Court's review is therefore limited to determining whether the Board has abused its discretion. *See Frazier Indus. Co., Inc. v. NLRB*, 213 F.3d 750, 759-60 (D.C. Cir. 2000); *O'Dovero v. NLRB*, 193 F.3d 532, 535 (D.C. Cir. 1999).

The Board's findings of fact are "conclusive" if they are supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). A reviewing court, therefore, may not "displace the Board's choice between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it de novo." *Id. Accord Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 306-07 (D.C. Cir. 2003). Further, this Court will not reverse the Board's adoption of an administrative law judge's credibility determinations "unless, unlike here, those determinations are 'hopelessly incredible,' 'self-contradictory,' or 'patently unsupportable.'" *Cadbury Beverages*,

Inc. v. NLRB, 160 F.3d 24, 28 (1998) (quoting Capital Cleaning Contractors, Inc.
v. NLRB, 147 F.3d 999, 1004 (D.C. Cir. 1998); Elastic StopNut Div. of Harvard
Indus., Inc. v. NLRB, 921 F.2d 1275, 1281 (D.C. Cir. 1990)).

SUMMARY OF ARGUMENT

The Board is entitled to summary enforcement of its uncontested Order requiring the Company to pay specific amounts of backpay. The administrative law judge found that the Company, by failing to answer and appear at the hearing to present a defense, admitted the specific amounts of lost wages and benefits calculated in the compliance specification. Before the Board, the Company filed no exceptions, and therefore the Order against the Company should be summarily enforced.

Further, the Board's decision not to pierce the corporate veil and hold Greene, a company co-owner and shareholder, and his wife, personally liable for the Company's backpay obligations is fully consistent with law. Specifically, the Board reasonably found that the General Counsel failed to show that the series of shareholder distributions that began in February 1999 were part of a strategy to evade the Company's liability under the Board's unfair labor practice order, and that "adherence to the corporate fiction would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *White Oak Coal Co., Inc.*, 318 NLRB 732 (1995), *enforced mem.*, 81 F.3d 150 (4th Cir. 1996). Under that second prong

of the Board's two-part test for piercing the corporate veil, the General Counsel failed to make the requisite showing that the shareholder distributions *flowed from* --or, in other words, were causally related to--a "*misuse* of the corporate form." *Greater Kansas City Roofing*, 2 F.3d at 1053; *White Oak Coal*, 318 NLRB at 735 (emphasis added).

Here, the shareholder distributions that began in February 1999 were never alleged nor found to be unlawful, and therefore cannot constitute the prerequisite "misuse of the corporate form." Indeed, as the Board found, those distributions were simply part of the lawful process of winding down the business and liquidating assets in anticipation of closing the business. Further, in rejecting the administrative law judge's recommendation that the Board hold the Greenes personally liable for the Company's backpay obligations, the Board explained that he had misapplied the second prong of the *White Oak Coal* test to the facts of this case by improperly conflating the timing of the shareholder distributions with the unfair labor practice conduct.

The Union challenges the Board's decision not to pierce the corporate veil solely on a factual basis. To the extent that the Union asks the Court to accept a view of the facts different from the Board's view, the Union's argument must be rejected because it would improperly require the Court to displace the Board's choice between, at best, two fairly conflicting views of the record evidence.

Further, the Union's request that the Court draw a different inference, and find that the shareholder distributions were part of a stratagem to evade backpay liability under the Board's Order, would improperly require the Court to engage in factfinding. In any event, the evidentiary matters that the Union cites either do not support the inference it asks the Court to draw, or do not mandate a different result. Therefore, the Union has failed to present the Court with any basis to reverse the Board's decision.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED ORDER REQUIRING THE COMPANY TO PAY SPECIFIC AMOUNTS OF BACKPAY

As shown at pp. 7-8, after the Company failed to answer the compliance specification, and failed to appear at the hearing, the administrative law judge found that the Company had admitted the specific amounts of lost wages and benefits that the Company owed the employees that were alleged in the compliance specification. Before the Board, the Company filed no exceptions to the judge's supplemental decision, and therefore that finding is uncontested. (A 8.) Accordingly, the Board is entitled to summary enforcement of its uncontested Order requiring the Company to pay specific amounts of backpay. *See Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 337 (D.C. Cir. 2003) (unchallenged Board findings are entitled to summary enforcement); *International Union of Petroleum*

& Indus. Workers v. NLRB, 980 F.2d 774, 778 n.1 (D.C. Cir. 1992) (same). *Cf. Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (judicial review is barred by Section 10(e) of the Act, 29 U.S.C. § 160(e), where no objection was urged before the Board).

- II. THE BOARD REASONABLY DETERMINED THAT THE GREENES ARE NOT PERSONALLY LIABLE FOR THE COMPANY'S BACKPAY OBLIGATIONS
 - A. Piercing the Corporate Veil To Impose Personal Liability on a Shareholder Is Reserved for Exceptional Circumstances Where an Injustice or Evasion of the Corporation's Legal Obligations Flowed From the Shareholder's Misuse of the Corporate Form

The Board assesses the issue of whether individual shareholders are liable for corporate obligations under the doctrine of piercing the corporate veil. The principles applicable to that doctrine are settled and not in dispute in this case. As the Supreme Court has stated, "[t]he insulation of a stockholder from the debts and obligations of [the] corporation is the norm, not the exception." *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960). That is because "a substantial purpose" of that corporate insulation is "to create an incentive for investment by limiting the exposure to personal liability." *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993). *Accord Labadie Coal Co. v. Black*, 672 F.2d 92, 96 (D.C. Cir. 1982).

Accordingly, "the corporate veil should be pierced only reluctantly and cautiously" (*Greater Kansas City Roofing*, 2 F.3d at 1051), and "the greatest

judicial deference normally is accorded to the separate corporate entity." *Labadie Coal Co.*, 672 F.2d at 96. However, "[the corporate] entity is still a fiction," and particular circumstances may warrant "look[ing] past a corporation's formal existence to hold shareholders or other controlling individuals liable for 'corporate' obligations." *Id.* Moreover, the doctrine of piercing the corporate veil is equitable in nature, and therefore its application is reserved for situations involving "impropriety or injustice," or "moral culpability." *Greater Kansas City Roofing*, 2 F.3d at 1051-52, 1053 (collecting commentary).

The question of whether to pierce the corporate veil in an unfair labor practice case is one of federal common law. *Bufco Corp. v. NLRB*, 147 F.3d 964, 969 & n.5 (D.C. Cir. 1998). *Accord NLRB v. West Dixie Enters., Inc.*, 190 F.3d 1191, 1194 (11th Cir. 1999). However, when the Board decides, on the particular facts of a case, "[w]hether a corporate veil ought to be pierced," the courts "give 'great weight' to the Board's determination" and will "uphold [it] if it is within 'reasonable bounds.'" *NLRB v. I.W.G., Inc.*, 144 F.3d 685, 689 (10th Cir. 1998) (quoting *Greater Kansas City Roofing*, 2 F.3d at 1051).

For many years, the Board determined whether to pierce the corporate veil by applying one of the several federal common law bases set forth in *Riley Aeronautics Corp.*, 178 NLRB 495 (1969). In *White Oak Coal Co., Inc.*, 318 NLRB 732 (1995), *enforced mem.*, 81 F.3d 150 (4th Cir. 1996), however, the

Board reconsidered the *Riley* standard, and found its "multifaceted approach . . . unclear and unwieldy." 318 NLRB at 734. Therefore, the Board adopted the two-pronged restatement of the federal common law standard articulated by the Tenth Circuit in *Greater Kansas City Roofing*, 2 F.3d 1047. *See White Oak Coal*, 318 NLRB at 734.

As the Board explained in *White Oak Coal*, it conducts the following two-part inquiry to determine whether to pierce the corporate veil and impose personal liability on shareholders: (1) whether "there is such unity of interest, and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct"; and (2) whether "adherence to the corporate form would sanction a fraud, promote injustice, or lead to an evasion of legal obligations." 318 NLRB at 735 (citing *Greater Kansas City Roofing*, 2 F.3d at 1052). *Accord Bufco Corp.*, 147 F.3d at 969; *West Dixie Enters., Inc.*, 190 F.3d at 1194-95.

Under the test's first prong, the inquiries relevant to determining whether separate identities have been preserved include "the degree to which the corporate legal formalities have been maintained," and "the degree to which individual and corporate funds, others assets, and affairs have been commingled." *White Oak Coal*, 318 NLRB at 735 (citing *Greater Kansas City Roofing*, 2 F.3d at 1054). *See Bufco Corp.*, 147 F.3d at 969. In making those inquiries, the Board considers an

array of specific factors. *See White Oak Coal*, 318 NLRB at 735; *Greater Kansas City Roofing*, 2 F.3d at 1052 n.6.

Under the second prong of the *White Oak Coal* test, the key inquiry is whether imposing personal liability on a shareholder is justified by "a compelling equitable reason . . . in the form of fraud, injustice, or evasion of legal obligations [that] flow[s] from the disregard of the separate corporate identity." *Greater Kansas City Roofing*, 2 F.3d at 1054-55. *See also id.* at 1052 (citing *Riley*, 178 NLRB at 501).

To satisfy that inquiry, however, it is insufficient merely to show that "an individual shareholder participat[ed] in a corporation's unfair labor practice[s]" (*Greater Kansas City Roofing*, 2 F.3d at 1053 n.7), or that the "corporation is incapable of paying all of its debts." *Id.* at 1053 (collecting cases). *See De Castro v. Sanifill, Inc.*, 198 F.3d 282, 285 (1st Cir. 1999) (same); *NLRB v. Fullerton Transfer & Storage Ltd., Inc.*, 910 F.2d 331, 341 (6th Cir. 1990) (same). Indeed, those conditions "will exist in virtually all cases in which there is an attempt to pierce the corporate veil." *Greater Kansas City Roofing*, 2 F.3d at 1053. *Accord Fullerton Transfer & Storage*, 910 F.2d at 341 ("That form of injustice . . . is present in every case.").

Rather, what must be shown is a form of fraud, injustice, or evasion of legal obligations that flowed from the shareholders' "misuse of the corporate form."

Greater Kansas City Roofing, 2 F.3d at 1053; White Oak Coal, 318 NLRB at 735 (emphasis added). As the Greater Kansas City Roofing court further explained, "[i]t is only when the shareholders disregard the separateness of the corporate identity and when that act of disregard causes the injustice or inequity or constitutes the fraud that the corporate veil may be pierced." 2 F.3d at 1053 (collecting cases) (original emphasis).

In other words, "[i]t is only when the quest to limit corporate responsibility evolves into a specific effort to evade a [] corporation's legal obligations that the possibility of veil piercing begins to loom." *United Elec., Radio & Mach. Workers v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1093 (1st Cir. 1992). Accordingly, the Board has explained that "the second prong of the test must have some causal relationship to the first prong." *In re Paolicelli*, 325 NLRB 194, 195 (1997), *enforced sub. nom. West Dixie Enters., Inc.*, 190 F.3d 1191.

B. The Facts of this Case Do Not Warrant Piercing the Corporate Veil and Imposing Personal Liability on the Greenes

The Board majority found (A 8-12) that the Greenes are not personally liable for the Company's backpay obligations under the Board's Order because the circumstances of this case do not warrant piercing the corporate veil. In so holding, the Board rejected (A 10-11) the administrative law judge's recommended finding (A 16-18) that personal liability should be imposed. As we now show, the

Board's decision is fully consistent with law and supported by substantial evidence.

The administrative law judge found (A 16-18) that the corporate veil should be pierced under the White Oak Coal standard. Under the first prong, the judge concluded (A 17) that Greene and Sanders had not preserved the Company's separate identity because they did not maintain minutes of their corporate meetings, made undocumented loans to the Company to cover payroll or other expenses, treated the company pickup trucks as individual property, and issued shareholder distributions without fair consideration of the pending unfair labor practice charges and complaint. Under the second prong of White Oak Coal, the judge concluded (A 18) that Greene and Sanders' "misuse of the corporate assets. . . resulted in an evasion" of the Company's backpay obligations. The judge based (A 17-18) that conclusion primarily on the correlation in timing between the shareholder distributions that began in February 1999, and Greene's conduct, which the Board later found unlawful under its April 14, 2000 unfair labor practice order.

Rejecting the administrative law judge's recommended finding, the Board found (A 10) that, even accepting arguendo that the first prong of the *White Oak Coal* test was established, the judge erred in applying the second prong.

Specifically, the Board found (A 10) that "the judge failed to analyze properly the

chronology of events and, without adequate record support, conflated the disbursement of corporate funds with the unfair labor practice allegations and findings." (*See* A 17-18.) As we now show, that conclusion is fully explained and supported by the record evidence.

As a preliminary matter, the Board emphasized (A 9, 10-11) that Greene and Sanders' closing of the business, and the accompanying shareholder distributions that began in February 1999 to liquidate company assets, were neither alleged nor found to be unlawful. Indeed, the record evidence shows that those distributions were made in a manner consistent with the Company's usual practice of splitting excess funds in equal amounts to Green and Sanders. (See A 609-11.) Moreover, even if Greene and Sanders had decided to close the business in response to the employees' union activities--a fact not established here --that closure would have been lawful. It is settled that, with regard to the Act, "an employer has the absolute right to terminate his entire business for any reason he pleases." Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 268 (1965). Accord United Food & Commercial Workers Int'l Union v. NLRB, 1 F.3d 24, 29 (D.C. Cir. 1993). Accordingly, the shareholder distributions issued to liquidate company assets in the process of winding down the business were themselves lawful, and therefore not a "misuse of the corporate form." Greater Kansas City Roofing, 2 F.3d at 1053; White Oak Coal, 318 NLRB at 735 (emphasis added).

As the Board explained (A 10), the shareholder payments were part of the Company's "process of liquidation [that] was begun for lawful reasons, [and] prior to the [Union's] making of any claim" of unfair labor practice conduct that potentially could result in backpay liability at some future point. As shown, early in 1999, the Company stopped taking on new work and decided to complete only the Pensacola project prior to Greene and Sanders' retirement. That process of winding down the business, and the attendant shareholder distributions, began in February 1999, more than 3 months before the first unfair labor practice charge was filed. Further, the unfair labor practice complaint did not issue until late July 1999, after the Company had completed the Pensacola project and ceased all work. *See* pp. 9-11.

The Board therefore found (A 10) that the Company's lawful process of liquidating corporate assets was well underway before Greene and Sanders were made aware by the first unfair labor practice charge that their conduct was being challenged, and that some monetary liability could potentially result at some future date. Indeed, as the Board emphasized (A 10), the bulk of the distributed assets -- over \$2 million--was paid *before* the first charge was filed. *See* p. 11. The other, post-charge distributions, the Board found (A 11), were simply a continuation and completion of that lawful liquidation process. Therefore, the Board reasonably concluded (A 11) that the process of liquidation was "unrelated to the Board's

Order," and that, in issuing the shareholder distributions, Greene and Sanders "did not strip[] the Company of its assets in order to defeat [the] Board's [unfair labor practice] Order."

Indeed, the courts have recognized there where--as here--the liquidation of assets was lawful, the corporation's resulting inability to pay a subsequently issued backpay award was not the type of inequity or injustice that would justify piercing the corporate veil. For example, in NLRB v. Fullerton Transfer & Storage Limited, *Inc.*, 910 F.2d 331 (6th Cir. 1990), the court held that the shareholders were not personally liable for the corporation's backpay obligations where they lawfully liquidated assets and closed the corporation without setting aside money to cover potential backpay liability. *Id.* at 341. In so holding, the court emphasized that, "[m]ost importantly, at the time the [shareholders] were liquidating the company's assets . . . , the Board's order had not yet been reduced to a certain amount and had not been enforced by this [c]ourt." Id. Under those circumstances, the court concluded that, "[a]bsent evidence that the [shareholders] impermissibly siphoned off assets . . ., no injustice is shown." *Id.* at 342. Similarly, in *Greater Kansas* City Roofing, the court held that the shareholder was not personally liable where there was no evidence she "used the corporate form . . . to work an injustice," or "looted the [corporate] assets . . . to avoid payment of the backpay award." 2 F.3d at 1051.

The key cases in which personal liability was imposed on shareholders also demonstrate that, to pierce the corporate veil, the shareholder's misuse of the corporate form must be causally linked to an attempted evasion of the corporation's backpay obligations. For example, in *Bufco Corporation*, 147 F.3d at 969, this Court upheld the Board's piercing of the corporate veil where the shareholder had entered into a "real property lease [that] was a 'sham' used to dissipate [corporate] assets" and to avoid paying the corporation's backpay obligations. *Id.* Specifically, the court noted that "[a]fter years of paying only minimal rent," the shareholder entered into a "sham" lease, under which he was to pay \$50,000 in rent, but deposited the check in the personal account of a family member. Id. Moreover, that misuse of the corporate form in Bufco Corporation was accomplished in late January 1990, approximately 2 weeks after oral argument was held before the Seventh Circuit in the proceeding to enforce the Board's unfair labor practice order, at a time it probably became clear to the shareholder that the Board's order would be enforced and liability imposed. See id; NLRB v. Bufco Corp., 899 F.2d 608 (7th Cir. 1990).

Similarly, in *White Oak Coal*, the Board found the shareholders personally liable where they "misrepresented [and] interchanged corporate identity and obligation in legal documents, after they were on notice of [the corporation's] pending backpay liability." 318 NLRB at 735. Specifically, the shareholders in

White Oak Coal misused the corporate form by transferring--for their own personal gain, and without any consideration paid to the corporate entity--a mining lease that was one of the corporation's principal assets to another corporation that they controlled, thereby causing the corporation to be unable to pay its backpay obligations. *Id.* Moreover, the shareholders accomplished that misuse of the corporate form in March 1986, approximately 6 months after the General Counsel issued the September 27, 1985 unfair labor practice complaint, and therefore at a time the shareholders were "on notice of [the corporation's] pending backpay liability." *Id.* at 733, 735. In contrast, here, the shareholder distributions were part of the lawful process of closing down the business, rather than a misuse of the corporate form, and the shareholders were not on notice of any pending backpay liability.

C. The Union's Factual Challenges to the Board's Decision Not To Pierce the Corporate Veil Are Meritless

The Union challenges (Br 22-35) the Board's decision not to impose personal liability on the Greenes solely on a factual basis, and without any citation to case law or other legal authorities. As we now show, to the extent that the Union asks (Br 22-35) the Court to accept a view of the facts different from the Board's view, it improperly seeks to have the Court engage in factfinding, and fails to recognize that it is the Board's, rather than the Court's, "role to find the facts." *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 818 (2d Cir. 1980). In any

event, the Union's contentions are otherwise meritless, and provide the Court with no basis to disturb the Board's dismissal of the compliance specification allegations against the Greenes.

There is no merit to the Union's key assertion that the shareholder distributions that began in February 1999 were "hastily arranged raids" (Br 35) that were "part of a strategy to defeat . . . the Board's remedies" (Br 23) by "siphoning off funds to avoid liability." (Br 32.) Indeed, that argument is founded on a view of the record evidence that the Board reasonably rejected. (*See* A 8, 9.) The Union's attempt to recharacterize the record evidence to support its preferred view fails because it is contrary to the fundamental principle that a reviewing court "may not 'displace the Board's choice between two fairly conflicting views [of the record evidence], even though the Court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), and cases cited at p. 14.

Nevertheless, the evidentiary claims that the Union makes (Br 22-35) to support its different view of the facts present this Court with no basis to disturb the Board's findings. For instance, the Union erroneously argues (Br 33-35) that, because the judge discredited (A 16) Greene's testimony that the decision to wind down the business and close after completing the Pensacola job was made in December 1998, there is no record evidence of any decision to wind down and

close the business prior to December 1999, when Greene and Sanders signed the formal dissolution papers.

To the contrary, the Board reasonably found (A 9, 10) that the decision to close was made in early 1999. In so finding, the Board relied on credited testimony and documentary evidence showing that the Company was not taking on any new work at that time, was simply completing the existing Pensacola project, albeit under a series of related contracts, and had begun liquidating its excess assets. As the Board explained (A 10-11), the shareholder distributions were triggered by the decision to close, and consistent with the process of winding down and closing the business. Indeed, it is undisputed that during the next 6 months the Company, in fact, took on no new work, completed only the existing Pensacola project, closed down all operations, sought legal advice on formal dissolution, changed its contractor license status to inactive, and arranged for the auctioning of its tools and equipment. *See* pp. 9-12.

Further, the Union asks (Br 27-28, 34) the Court to speculate on the meaning or implication of various statements that Greene either made, or failed to make, to his employees, a Board agent, or at the pre-election hearing, concerning either his intention to take on more work or the decision to close the business. Not only are these matters of speculation, they are highly unreliable given the administrative law judge's determination (A 16) to discredit Greene's testimony, "except that

which other, credited evidence corroborates." Indeed, in making that determination, the judge cited (A 16) inconsistencies with Greene's earlier preelection hearing testimony, upon which the Union heavily relies (Br 10-15, 28, 34) as support for its different characterization of the facts in this case.

Also of no consequence is the Union's point (Br 34) that there are no documents showing that a decision to close the business was made anytime before Greene and Sanders signed the formal dissolution papers in December 1999. The absence of such documents is insignificant, given the Board's finding (A 17) that Greene and Sanders did not maintain *any* corporate meeting minutes. Indeed, Member Schaumber wrote separately (A 10 n.12) to emphasize that "it is hardly surprising that a small, closely held corporation like [the Company] did not rigidly observe all corporate formalities, such as maintaining corporate meeting notes."

The Union also mistakenly relies on other evidence that does not support its position. For example, as evidence that Greene was involved in a strategy to evade the Company's backpay liability, the Union cites (Br 31, 35) the altered auction announcement (A 575) that he sent to the Board's Regional Office in September 1999, on which he noted: "This sale was made possible by [the Union] and the [Board]," who "should feel very proud of their efforts in putting a small, independent contractor out of business." As the Board stated (A 11), Greene's comment "neither states nor implies that the decision to close the Company and

make distributions to its owners was a stratagem for defeating the Board's remedies." At best, the comment indicates that Greene and Sanders may have decided to close the business because of the union campaign, which, as shown, would have been lawful. *See Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965), and cases cited at p. 24.

In sum, the Board's decision not to pierce the corporate veil and impose personal liability on the Greenes for the Company's backpay obligations is fully consistent with law, and unchallenged on that basis before the Court. Moreover, the Union fails in its attempt to undermine the Board's decision simply by presenting the Court with a different view of the record evidence than that accepted by the Board. Therefore, the Board's Order dismissing the compliance specification allegations against the Greenes is entitled to affirmance.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment dismissing the Union's petition for review and enforcing the Board's Order in full.

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